'From Mutual Trust to the Full Effectiveness of EU law: 10 Years of the European Arrest Warrant' re-print from EL Rev

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Analysis and Reflections

From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant

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Keywords

Abstract

Ten years have elapsed since the European Arrest Warrant (EAW) was adopted. While the early case law concerning the legitimacy of the EAW confirmed the Court of Justice's insistence on sufficient trust in the European area of prosecutions, in order to justify the operation of this instrument, more recent cases have shown that there are limits to mutual trust also in the context of the EAW. The question that became the crucial testing ground for the credibility of the EAW and its establishment of the principle of mutual trust was the possibility for Member States to choose not to execute a request for an EAW under certain circumstances. This article discusses how the Court's case law appears to have shifted from an overreliance on trust to a mainstreaming of the EAW on the basis of classic EU law by insisting on its compliance with the principle of full effectiveness. In doing so, the article first looks at the recent cases of Da Silva Jorge *and* Melvin West *before discussing them in the wider context of mutual recognition in the area of freedom, security and justice.*

Introduction

The EAW has become the most litigated Third Pillar instrument in the European Union's history.[1] It was highly controversial when it was adopted in 2002 as it abolished dual criminality for a list of 32 categories of crimes and introduced the concept of mutual recognition in the Area of Freedom, Security and Justice (AFSJ). And it still causes controversy in some national legal systems. Yet in spite of the timeframe of the 10 years in which this instrument has been in place, and despite the extensive critiques presented by academic commentators on the feasibility of the EAW (especially because of its introduction of mutual recognition to EU criminal law and the implications of the EAW framework for human rights protection), this instrument is not only still "alive and kicking" but also continues to provoke debate. With the entry into force of the Lisbon Treaty, the former pillars of the Union were of course abolished (even though the transitional provisions of Protocol 36 provides that existing Third Pillar measures adopted before the entry into force of the Lisbon Treaty will remain in force until December 2014). The former Third Pillar area and the rules concerning mutual recognition in criminal law matters now form part of the AFSJ and are governed by art.67 TFEU and art.82 TFEU of Pt V of the TFEU, which sets out the rules governing

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[1] The European Arrest Warrant Framework Decision [2002] OJ L190/1.

procedural criminal law competences and establishes mutual recognition as the main principle underpinning EU criminal law co-operation.

The debate on the EAW has been centred on the interpretation of mutual trust and thereby the elasticity of the loyalty principle, codified in art.4(3) TEU, in national courts. The EAW litigation saga started with an assumption that mutual trust was the prevailing condition for upholding the legality of the EAW.[2] *Advocaten voor de Wereld*[3] was the first test case on the validity of the EAW brought before the Court of Justice, in which the legality of the EAW was upheld. But even before that, national courts, among them the German Federal Constitutional Court, had questioned the loyalty obligation within the former Third Pillar, which rested on a rather thin judicial obligation set by the *Pupino* ruling in 2005. In that case, a loyalty commitment was found (or discovered to apply also in the Third Pillar).[4] Yet the judgment in *Advocaten voor de Wereld* indicated that the EAW was a legal experiment based on the necessary conception of the existence of trust. This judgment insisted that the underlying idea of the EAW and the rule to abolish the notion of dual criminality did not breach the principle of legality, since the Framework Decision was concerned with procedural law and not substantive law. The main reason for such a conclusion was, according to the Court of Justice, the high degree of trust and solidarity between the Member States. In addition, the Court stressed the fact that the crimes listed in the EAW adversely affected public order and public safety, which justified the abolition of dual criminality for all crimes listed in the EAW.[5] Nevertheless, although the main rule under the EAW is the presumption of mutual trust as the basis for mutual recognition, so that no extra judicial safeguards are needed, this raised problems in the context of the smooth operation of the EAW as regards the possibility for national courts to review the compatibility of the EAW with human rights protection.

The question that became the crucial testing ground for the credibility of the EAW and its establishment of the principle of mutual trust was the possibility for Member States to choose not to execute the request of an EAW under certain circumstances. For example, art.3 EAW provides a list of mandatory grounds for refusing to execute an EAW, such as where there are granted amnesties, where there is a *ne bis in idem* (double jeopardy) situation, or where, for example, the person in question is deemed too old to stand trial. Article 4 of the EAW, on the other hand, lists a number of so-called optional grounds for refusing to surrender and thereby reinstates the dual criminality concern by giving some discretion to national authorities in this regard. Moreover, there are possibilities to refuse to surrender a person where the crime in question is statute barred, or does not constitute a crime in the executing state, or if the EAW has been issued for the purposes of execution of a custodial sentence or a detention order, and the person in question is resident in the executing state, and that state undertakes to execute the sentence or detention order in accordance with its domestic law.[6]

The Court has been forced to deal with these issues in a number of recent judgments. In *Kozolowski*,[7] for example, the Court made it clear that the scope for optional non-execution is limited to persons who, if not nationals of the executing Member State, are "staying" or "resident" there. This left the exact meaning

[2] Among the many commentators see e.g. V. Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU" (2006) 43 C.M.L. Rev. 1277; C. Rijken, "Re-balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters" (2010) 47 C.M.L. Rev. 1455; S. Peers, *EU Justice and Home Affairs* (Oxford: Oxford University Press, 2011), Ch.9; M. Fichera, *The Implementation of the European Arrest Warrant in the European Union Law, Policy and Practice* (Antwerp: Intersentia, 2011).

[3] *Advocaten voor de Wereld VZW v Leden van de Ministerraad* (C-303/05) [2007] E.C.R. I-3633; [2007] 3 C.M.L.R. 1.

[4] *Criminal Proceedings against Pupino* (C-105/03) [2005] E.C.R. I-5285, [2005] 2 C.M.L.R. 63; see e.g. G. Cloots, "Germs of Pluralist Judicial Adjudication on the EAW" (2010) 47 C.M.L. Rev. 645.

[5] See e.g. V. Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing, 2009), pp.138–142.

[6] See e.g. E. Herlin-Karnell, "The EAW and the Principles of Non-discrimination and EU Citizenship" (2010) 73 M.L.R. 460.

[7] *Criminal Proceedings against Kozolowski* (C-66/08) [2008] E.C.R. I-6041; [2008] 3 C.M.L.R. 26.

of interpretation of residence somewhat open. In *Wolzenburg*,[8] the fundamental issue of the right to non-discrimination and citizenship rights arose. Hence *Wolzenburg* added an additional layer to the complexity of the EAW by insisting that non-discrimination and citizenship applied in the context of the EAW. In doing so, the Court indicated that mutual recognition was not absolute as the area at stake—EU criminal law co-operation—was so closely associated with the adequate protection of human rights and fair trial rights in particular. Subsequently, crucially, in the judgment in *IB*[9] concerning the operation of the EAW and trial in absentia, the Court confirmed that mutual recognition is not absolute. At [50] of its judgment, the Court pointed out that while it is true that the EAW is based on the principle of mutual recognition, that recognition does not, as is clear from arts 3 to 5 of the Framework Decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued. The Court stressed the importance of allowing for some national discretion in this area and especially the importance of enabling particular weight to be given to the possibility of increasing the requested person's chances of reintegrating into society.[10]

The recent judgments in *Da Silva Jorge* and *Melvin West*[11] are part of this series of cases, which all add to the robustness and testability of the EAW. In *Da Silva Jorge*, the Advocate General had focused his Opinion on the need to recognise clearly the limits to mutual recognition in criminal law matters, and concluded that trust is a highly differentiated concept. However, the Court relied chiefly on the doctrine of indirect effect, following the developments in the sphere of remedies, and thus shifted its jurisprudence on EU criminal law more towards the doctrine of effectiveness.[12]

This article proceeds as follows. It begins by discussing the judgment in *Da Silva Jorge*, as it represents a good test case for the framework of the EAW. Thereafter, the article turns to look at the *Melvin West*[13] judgment and the complexities that can arise in a situation of the multiple issuing of arrest warrants, addressing, in particular, how to deal with the requirement of consent from each relevant Member State. Subsequently, the article moves on to place the EAW in context by discussing a number of recent cases concerning the limits of mutual recognition and, more specifically, the scope of the EAW; and by trying to show how the EAW, 10 years later, has indeed come a long way. It will be revealed that the system of the EAW has moved from an (over)reliance on trust as the legitimate basis for its operation to a classic insistence on compliance with the notion of the full effectiveness of EU law. However, the article also discusses possible problems with such an approach.

The *Da Silva Jorge* judgment—the EAW and the full effectiveness of EU law

The recent judgment in *Da Silva Jorge* concerns Mr Lopes Da Silva Jorge, a Portuguese national residing in France, who in 2003 was given a five-year prison sentence for offences committed in 2002. It is unclear why the sentence was not enforced directly, but on September 14, 2006, the national court in question issued an EAW against Mr Lopes Da Silva Jorge with a view to enforcement of that sentence. In the meantime, he had moved to France, married a French citizen and also started working there as a lorry driver. For these family and work related reasons, Mr Lopes Da Silva Jorge opposed his surrendering to

[8] *Criminal Proceedings against Wolzenburg* (C-123/08) [2009] E.C.R. I-9621; [2010] 1 C.M.L.R. 33.

[9] *Criminal Proceedings against IB* (C-306/09) [2011] 1 C.M.L.R. 39.

[10] See e.g. E. Herlin-Karnell, "Is the Citizen driving the EU's Criminal Law Agenda?" in M. Dougan, N. Nic Shuibhne and E. Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Oxford: Hart Publishing 2012), Ch.9.

[11] *Execution of a European Arrest Warrant in respect of Melvin West* (C-192/12 P) June 28, 2012.

[12] *Execution of a European Arrest Warrant against Joao Pedro Lopes Da Silva Jorge* (C-42/11) [2012] 3 C.M.L.R. 54. The Court cited, e.g. *Dominguez v Centre informatique du Centre Ouest Atlantique* (C-282/10) [2012] 2 C.M.L.R. 14. On effectiveness, see e.g. A. von Bogdandy, "Founding principles" in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Hart/Beck/Nomos, 2011), Ch.1.

[13] *Melvin West* (C-192/12 P) June 28, 2012.

Portugal and claimed that an execution of the arrest warrant would disproportionately infringe his right to family life under art.8 ECHR. In addition, he argued that such a surrendering would clash with the non-discrimination principle in art.18 TFEU on the grounds that the French law at issue allowed for the possibility of French nationals only serving their prison sentence at home instead of being surrendered for offences committed abroad.

In the present case, the French authorities had concluded that none of the optional opt-outs from the EAW applied. More specifically, the relevant French law, the Code of Criminal Procedure, stated in art.695–24 that,

> "the execution of an EAW may be refused if the person requested for the purposes of executing a custodial sentence or a measure involving deprivation of liberty is of French nationality and the competent French authorities undertake to execute that sentence or measure."

The French authorities highlighted the fact that the Court of Cassation[14] had confirmed the validity of the national law, which applied to French nationals only and afforded them extra procedural safeguards to escape arrest warrants being executed so as to facilitate their integration process on the "normal" French employment market. Therefore the referring court queried whether the principle of non-discrimination precluded France from having the relevant legislation in place.

The Opinion of A.G. Mengozzi

A.G. Mengozzi delivered his Opinion on March 20, 2012, focusing on the limits to the mutual recognition principle when applied in EU criminal law. In doing so, he began by stressing the need for mutual trust, forming, as it does, the basis of the EAW, and outlining why such trust needs to be increased. In that context, he argued that,

> "the principle of mutual recognition which lies at the heart of the mechanism behind the European arrest warrant cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification or a driving license issued by another Member State."[15]

A.G. Mengozzi also pointed out that, in the light of the "higher principle" of human dignity, the cornerstone of the protection of fundamental rights within the EU legal order, the free movement of judgments in criminal matters must not only be guaranteed but also, where appropriate, limited.

After having asserted the jurisdiction of the Court, inter alia that France had made a voluntary declaration under the former art.35 TEU to allow for the Court's jurisdiction in the former Third Pillar, the Advocate General began his analysis by observing that art.1(3) of the EAW states that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental principles as enshrined in EU law. However obvious this statement sounds, it is an important assertion by the Advocate General as, before the Lisbon Treaty, it was far from clear to what extent the fundamental rights *acquis* applied to the EAW since there was no general human rights exception in this instrument. Admittedly, A.G. Cruz Villalón, in his Opinion in the *IB* ruling, had stressed that,

> "although mutual recognition is an instrument for strengthening the area of security, freedom and justice, it is equally true that the protection of fundamental rights and freedoms is a precondition which gives legitimacy to the existence and development of this area."[16]

[14] No.07-80.162, Bull. Crim. No.39.
[15] Opinion of A.G. Mengozzi in *Da Silva Jorge* (C-42/11) [2012] 3 C.M.L.R. 54 at [28].
[16] Opinion of A.G. Cruz Villalón in *IB* (C-306/09) [2011] 1 C.M.L.R. 39 at [43].

But A.G. Mengozzi stated additionally that the issuing of warrants must also be applied in the context of the individual situation underlying each request for the execution of a warrant with the foremost concern of the dignity of the sentenced person.

Moreover, the Advocate General explained that since the EAW is based on the concept of mutual recognition, which presupposes trust, the margin of discretion left to the Member States when executing EAWs must correspondingly comply with and be exercised in a consistent manner with Union law. Most importantly, he recognised the importance of a case-by-case approach in this area since circumstances may vary. In his view, it was also very clear from the French legislation at issue directly discriminated against non-nationals. Therefore the Advocate General easily concluded that the principle of non-discrimination enshrined in art.18 TFEU precluded national legislation in confining the powers to refuse the execution of an EAW issued to French nationals only. In conclusion, A.G. Mengozzi argued that the relevant provisions of the French Code of Criminal Procedure had to apply to nationals of the other Member States of the European Union; and that the referring court would have to take into account the various objectives pursued by the Framework Decision, including the possibilities for the successful rehabilitation of the sentenced person.

The Court of Justice's judgment

The Court first stated that there was no absolute obligation under the EAW to execute warrants. The Court cited previous EAW cases, among them the *IB*[17] and *Wolzenburg*[18] cases, and also pointed out that art.4 of the EAW allowed for some discretion when complying with mutual recognition and established limits to the execution of warrants. The Court observed that the reason for allowing for optional execution of warrants under certain circumstances has the particular objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on them expires. Therefore the Member States have a certain margin of discretion when they transpose art.4(6) of the Framework Decision into their domestic law. But the Court pointed out that Member States are not entitled to give those terms a broader meaning than that which derives from a uniform interpretation of that provision in the Member States as a whole. However, the Court set out to clarify that the requirement of "staying" in the territory of the executing state could not be given an overbroad meaning, so as to cover people who are only temporarily staying in a country.

The Court, citing *Wolzenburg*, stressed that although a Member State may, in transposing art.4(6) of the EAW, decide to limit the situations in which its executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude the nationals of other Member States from staying or residing in its territory irrespective of their connections with it. Moreover, the Court emphasised that neither the Convention on the Transfer of Sentenced Persons,[19] which France had ratified and which allows a state that is a party to that Convention to limit to its own nationals the possibility of a sentence imposed in another state being enforced within its territory, nor any other rule of international law requires states to make provisions for such a rule. In addition, the Court pointed out that any state which is a party to the Convention has the possibility, by a declaration addressed to the Council of Europe, to define the term "national" for the purposes of that Convention as including certain categories of person staying or resident in that state without being nationals thereof. As a number of Member States had made such declaration, there was no reason, in the view of the Court, why France had not and therefore could justify its national limitations.[20]

[17] *IB* (C-306/09) [2011] 1 C.M.L.R. 39.
[18] *Wolzenburg* (C-123/08) [2009] E.C.R. I-9621.
[19] Convention on the Transfer of Sentenced Persons, signed on March 21, 1983 in Strasbourg.
[20] *Da Silva Jorge* (C-42/11) [2012] 3 C.M.L.R. 54 at [48].

Furthermore, the Court reiterated the now well-established Third Pillar axiom that, in accordance with the *Pupino* case,[21] framework decisions can have indirect effect despite the explicit text of the former art.34(2)b TEU that they could not entail direct effect. Fundamentally the Court observed that,

> "when national courts apply domestic law they are therefore bound to interpret it, so far as possible, in the light of the wording and the purpose of the framework decision concerned in order to achieve the result sought by it. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them."[22]

The Court went on to state that it is true that the doctrine of consistent interpretation has some limitations, such as, notably, the rule that there is no obligation to interpret national rules *contra legem*. Nevertheless, this did not prevent the Court from concluding that,

> "the fact remains that the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it."[23]

For this reason, the Court made it clear that the EAW must be interpreted in the light of art.18 TFEU and the axiom of non-discrimination. Consequently, a Member State, when implementing the optional non-surrendering provision, cannot reserve this possibility to its own nationals only; rather, the law in question must be extended to nationals of other Member States lawfully staying or residing in its territory. Hence it could be argued that the message sent by the judgment in *Da Silva Jorge* indicates that the EAW is now fully "Lisbonised" through the Court's insistence that the basic rights granted by the Treaty should apply to the EAW also.

Melvin West: ancient maps and multiple arrest warrants

The recent case of *Melvin West* offers a further example of the complexities of the EAW when there are multiple requests at stake from different Member States simultaneously.[24] The case concerns Mr West, a British national, who seemed to specialise in the art of stealing rare ancient maps. Because of his apparent success in that endeavour, three arrest warrants were issued against him for the purposes of bringing him to justice, issued by courts in France, Finland and Hungary respectively. The French judicial authorities, on the grounds that Mr West allegedly stole ancient maps from the French national library, issued the first EAW against him. However, given that Mr West was at that time serving a prison sentence for other (unspecified in the judgment) criminal activity in the United Kingdom, it was not possible to obtain his surrendering from the United Kingdom. For this reason, Mr West was sentenced in absentia to three years' imprisonment by the French court. The second EAW was issued by Finland regarding the theft of ancient maps also, this time from the university library in Helsinki. The third arrest was issued by the Hungarian authorities on the basis that Mr West had allegedly removed a number of 17th century atlases of great value from the Hungarian national library.

[21] *Pupino* (C-105/03) [2005] E.C.R. I-5285.
[22] *Da Silva Jorge* (C-42/11) [2012] 3 C.M.L.R. 54 at [54].
[23] *Da Silva Jorge* (C-42/11) [2012] 3 C.M.L.R. 54 at [56].
[24] *Melvin West* (C-192/12 P) June 28, 2012.

The United Kingdom surrendered Mr West to Hungary, where he was sentenced to 16 months' imprisonment. On September 15, 2011, Hungary surrendered Mr West to Finland pursuant to the EAW issued by the Finnish authorities. But the Hungarian authorities issued a letter saying that once the Finish criminal law proceedings were over, Mr West should be handed over to the French authorities and that Hungary consented to that surrendering. For these reasons, the Finnish court took steps to establish whether the United Kingdom had consented to Mr West's surrendering to France. The United Kingdom made clear that it had not given its consent to such a surrendering. Consequently, the Finnish court asked the Court of Justice if the execution of an EAW to surrender Mr West to France required the consent of all Member States concerned, and not only of the last Member State that issued the EAW. The Framework Decision itself gave little guidance as regards multiple EAWs. Article 28(2) states that a person who was surrendered to the issuing Member State pursuant to an arrest warrant may be surrendered to a Member State other than "the executing Member State" pursuant to an EAW in respect of an offence committed prior to his surrender to that issuing Member State only with "the consent of the executing Member State". As none of the Member States in question had given their consent under art.28(1), the case reached the Court of Justice. After request from the Finnish authorities, the case was dealt with under the urgent preliminary ruling procedure, since Mr West was being deprived of his liberty pending the outcome of the proceedings.

The main question as presented in this case was whether Mr West's surrender by the third executing Member State, in this case Finland, to France made it necessary to obtain the consent of the first executing Member State also, i.e. the United Kingdom. On June 28, 2012, the Court of Justice delivered its judgment. The Court answered no, on the basis that if Member States were to seek the consent of all of the Member States concerned, so that consent had to be obtained by both the first and the second executing Member State, that would, according to the Court, undermine the attainment of the objective pursued by the EAW, namely that of accelerating and simplifying judicial co-operation between the Member States. The Court acknowledged that the Schengen Information System (SIS) has made the attainment of consent easier, as such a request could be sent simultaneously to all the executing Member States involved. However, the Court pointed out that a system in which consent has to be sought in respect of each Member State involved in the EAW chain of issued warrants increases the possibility of disparities between the Member States arising. Therefore the Court concluded that the concept of an "executing Member State" refers to the Member State which carried out the last surrender of the person concerned. Such an interpretation facilitated, according to the Court, the very concept of mutual recognition. Again, the Court pointed out, citing the *IB* case,[25] that the concept of mutual recognition was not absolute.

In reaching this conclusion, the Court stressed that,

> "the principle of the free movement of persons which confers in Article 21(1)TFEU the right on every citizen to move and reside freely within the territory of a Member State other than that of which he is a national or resident, it cannot be assumed that there must in any event be a particular connection between the first executing Member State and the requested person, it also being possible for that person to be a national and/or resident of the second or third executing Member States, or even of another Member State which was not involved in the chain of European arrest warrants issued in respect of that person. The requested person could therefore find himself temporarily on the territory of the first executing Member State without having any noteworthy connection with it which would show some degree of integration within the society of that State."[26]

Consequently, a strict insistence on consent would not be necessary since the underlying spirit of the EAW is trust and the purpose of the derogation granted by arts 3–5 of the EAW serves to enable people to benefit from rehabilitation. Hence the Court concluded that art.28(2) of the EAW must be interpreted as meaning

[25] *IB* (C-306/09) [2011] 1 C.M.L.R. 39.
[26] *Melvin West* (C-192/12 P) June 28, 2012 at [73].

that, where a person has been subject to more than one surrender between Member States pursuant to successive warrants, the subsequent surrender of that person to a Member State other than the Member State having last surrendered him is subject to the consent only of the Member State which carried out that last surrender.

Ten years of the EAW[27]

The contention of this article is that the *Da Silva Jorge* and *Melvin West* cases are not just further judgments on the EAW, but that these rulings help us to crystallise the "communitarisation" of this measure and tell us that the old Third Pillar law is now fully within the scope of EU supranational law. Indeed, the EAW continues to cause controversy. After all, the *Julian Assange* case,[28] and the legal and political drama it caused and is still likely to cause, concerning the Wikileaks founder's surrender to Sweden on the grounds that he allegedly committed sexual offences there, demonstrates that although the EAW has come a long way, there is still serious mistrust in some quarters. The whole idea of free movement of suspected criminals within the European Union and the operation of the EAW have been received with some scepticism in the national arena. In any event, the *Da Silva Jorge* case appears to have shifted focus from the previous debate on the limits to mutual trust to the full effectiveness of EU law, turning the EAW saga into one pertaining to the classic effectiveness test in line with recent cases on indirect effect.[29] *Da Silva Jorge* demonstrates that what was previously referred to as the "Community method" now permeates this whole area, meaning that there are not many traces left of the intergovernmental era. Notwithstanding the Transitional Protocol, which stipulates the requirement to accept and respect existing Third Pillar measures until 2014, the Court has stressed the importance of its full jurisdiction in this area of law in order to ensure its consistency.

The EAW in context and the elasticity of mutual recognition

As explained above, the EAW is the most hotly debated EU instrument in the history of Third Pillar law. It was adopted in the aftermath of 9/11 and caused controversy as it abolished the requirement of dual criminality for a list of 32 crimes as part of the adoption of the mutual recognition template in the third pillar area. Nonetheless, the *Da Silva Jorge* case should be seen in the light of the broader discussion on the limits to mutual recognition and, as such, it forms part of the bigger debate on the AFSJ and the function of trust. It should be recalled that in the *NS*[30] case in the context of the EU asylum system, the Court asserted that if there are substantial grounds for believing that there are systematic flaws in the asylum procedure in the Member State responsible, then the transfer of asylum seekers to that territory would be incompatible with the Charter of Fundamental Rights. The Court stated that the raison d'être of the European Union and the creation of an AFSJ was that of mutual confidence. But the Court concluded that such presumption could be rebutted if the system in question is not compliant with the Charter.[31] This case should then be seen as a parallel development to the litigation on the EAW and the limits set to mutual recognition.

[27] Or eight years, taking art.32 of the Transitional Protocol into account, which stipulates that extradition requests received before January 1, 2004 will be governed by the old procedure unless the Member State in question has made a statement that all requests should be dealt with under the EAW from its entry into force.

[28] *Assange v Swedish Prosecution Authority* [2012] UKSC 22; [2012] 2 W.L.R. 1275.

[29] *Dominguez* (C-282/10) [2012] 2 C.M.L.R. 14.

[30] *NS v Secretary of State for the Home Department* (C-411/10 and C-493/10) [2012] 2 C.M.L.R. 9.

[31] See M. Fichera and E. Herlin-Karnell, "The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?", *European Public Law* (forthcoming 2013, on file with the author).

Thus mutual recognition of judicial decisions across the Member States presupposes a climate of trust between the domestic legal orders, which appears particularly difficult to achieve in an area as sensitive as criminal law. After all, generally speaking, criminal law deals with the deprivation of liberty, in contrast to the imperative of EU free movement. Furthermore, one common problem frequently highlighted by academic commentary is that there is no definition of "mutual trust" in the field of criminal law.[32] This lack of conceptualisation has been considered as constituting a significant lacuna in EU criminal law co-operation. In this regard, it is often pointed out that there is currently insufficient mutual trust between the Member States and no adequate European regime for the protection of human rights within the former Third Pillar to justify the analogy with the operation of mutual recognition within the internal market.[33]

However, as explained above, several rulings on the EAW are important to the outcome in *Da Silva Jorge* and they need, therefore, to be put in context. The peculiarities of the EAW and how the Member States should deal with it have been discussed in a series of recent cases. Hence, in the *Wolzenburg* and the *Kozlowski* judgments, which also concerned the possibilities of refusing to surrender under the EAW, the question as regards the appropriate time frame for considering a person as staying or residing in a host state was raised.[34] As noted above, in *Kozlowski*, the Court of Justice held that the term "staying", in order to benefit from the exception to the rule (namely, the automatic execution of warrants), cannot be interpreted in a broad way. For this reason, the Court made it clear that a requested person is "resident" in the host state when they have established their actual place of residence there and is "staying" there when, following a stable period of presence, they have acquired connections with that state which are of a similar degree to those resulting from residence. Nonetheless, the Court stated that it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of the person in question, including, in particular, the length, nature and conditions of their presence, and any family and economic connections that that person possesses in the executing Member State. In *Wolzenburg*,[35] the question arose as to whether it constituted discrimination to distinguish between a state's own nationals and non-nationals in this regard and whether an additional administrative burden—such as a residence permit—was in line with the axiom of non-discrimination in EU law. The Court held that non-discrimination applied also in the former Third Pillar; and, in addition, that the notion of citizenship applied to the EAW, but that the established residency requirement set by Directive 2004/38 meant that that measure's five-year residency condition applied before a claimant could fully benefit from rehabilitation possibilities in the host state.[36]

Subsequently, in the judgment in *IB*,[37] concerning trial in absentia, the Court confirmed that mutual recognition is not absolute. At [50] of this judgment, the Court pointed out that while it is true that the EAW is based on the principle of mutual recognition, that recognition does not, as is clear from arts 3 to 5 of the Framework Decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued. The Court stressed the importance of allowing for some national discretion in this area

[32] For a discussion of the notion of trust see e.g. Mitsilegas, *EU Criminal Law* (2009), Ch.3; see also N. Walker, "The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis" in M. Anderson and J. Apap (eds), *Police and Justice Cooperation and the New European Borders* (The Hague: Kluwer Law International, 2002), p.22, as well as M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Cambridge: Intersentia, 2011), pp.207–211.

[33] S. Peers, *EU Justice and Home Affairs* (Oxford: Oxford University Press, 2011), Ch.9.

[34] *Kozolowski* (C-66/08) [2008] E.C.R. I-6041; for commentary see e.g. M. Fichera, "Case C-66/08, Proceedings concerning Szymon Kozlowski" (2009) 46 C.M.L. Rev. 241, and T. Konstadinides, "The Europeanisation of Extradition: How Many Light Years Away to Mutual Confidence?" in C. Eckes and T. Konstadinides, *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge: Cambridge University Press, 2011).

[35] *Wolzenburg* (C-123/08) [2009] E.C.R. I-9621.

[36] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

[37] *IB* (C-306/09) [2011] 1 C.M.L.R. 39.

and especially the importance of enabling particular weight to be given to the possibility of increasing the requested person's chances of reintegrating into society. Moreover, in the *Mantello*[38] case, concerning the scope of the mandatory options for non-execution of arrest warrants under art.3(2) of the EAW, the Court stated that the *ne bis in idem* principle should be given an autonomous interpretation in EU law. All of these cases added to the construction of the AFSJ and, more specifically, to the effectiveness of the practicality of the EAW.

The *Da Silva Jorge* case adds to this line of EAW judgments by having focused not on mutual recognition and trust as the bearing point but on the scope of the effectiveness test. In addition, the *Da Silva Jorge* case also clarified the "staying" criterion by making it clear that even though this concept has to be defined uniformly in all of the Member States, so as not to increase disparities between the Member States, it has to be placed in the context of "integrating" into society. The Court made it clear that it cannot be accepted that a requested person who, without being a national of the executing Member State, has been staying or been resident there for a certain period of time is not in any circumstances capable of having established connections with that state which could enable him to invoke that ground for optional non-execution. It is for the executing national judicial authority to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence, and the family and economic connections that he has with the executing Member State. The important aspect is, according to the Court, that a sufficient degree of integration in that society is comparable to being a national of that Member State. This underlying idea of the re-integration process in society is also mirrored in the *Melvin West* case, which asserted the need for consent by the last Member State concerned only instead of adding an extra administrative burden of requiring consent further back in the EAW chain.

In the pending case of *Stefano Melloni*,[39] on the validity of the amendments made to the EAW by Framework Decision 2009/299/JHA,[40] and addressing the application of the principle of mutual recognition to trial in absentia, A.G. Bot has provided an interesting account of the relationship between the EAW and the Charter of Fundamental Rights. The Advocate General has made it clear that the Member States have the possibility of using the emergency brake (under art.82(3) TFEU) in this context and that they have chosen a joint approach in this area, with regards to the amendments made to the EAW. It should be recalled that under the emergency brake procedure, the Member States have the possibility of referring a proposed measure to the European Council if they consider that it is too sensitive having regard to their national legal systems. For this reason, A.G. Bot concluded that the EAW, as amended by Framework Decision 2009/299, and the rules governing trial in absentia were compatible with the provisions of the Charter and the right to effective judicial protection. Interestingly, there was no reference to the *IB* case regarding the limits set to mutual recognition in the context of the EAW, as discussed above. Instead, the Advocate General focused on art.53 of the Charter, which provides for the highest relevant human rights standard to be applied. In doing so, he argued that the Charter is not, in any event, a primacy-restricting measure and does not empower the Member States to "opt out" from EU law. It could be argued, though, that art.53 also enables the European Union to adopt a higher standard. The interesting question in the present context is what would happen if the ECHR provides for a higher standard with regard to human rights protection? To find out whether this is the case would require an extensive reading of the case law of the ECtHR, which is beyond the scope of the present article. Needless to say, the Court of Justice's view on this remains to be seen. It will be interesting to see if the Court will tackle the issue in the light of effective judicial protection, as provided for in art.47 of the Charter (and art.19 TEU), and what implications that would have in the context of the EAW. Also, needless to say, the AFSJ is still a work

[38] *Criminal Proceedings against Mantello* (C-261/09) [2011] 2 C.M.L.R. 5.
[39] Opinion of A.G. Bot in *Criminal Proceedings against Stefano Melloni* (C-299/11), October 2, 2012.
[40] [2009] OJ L81/24.

in progress, so that each individual judgment that adds to the clarification of the EAW helps to solve these puzzles.

Moreover, the recent Opinion by A.G. Sharpston in the pending case of *Radu*[41] offers an interesting perspective on the boundaries of the EAW and the survival of the concept of mutual recognition. Apart from the fact that the case involves somewhat "strange" questions, in the sense that some of the questions asked by the national court have already been extensively discussed in the "normal" context of criminal law policy and human rights protection, the *Radu* case is important on the issue of the scope of the Charter.[42] More specifically, the question asked was whether arresting someone breaches that person's right to liberty in EU law. In her Opinion, A.G. Sharpston charts well-known (criminal law) water here by looking into the Strasbourg case law and arts 5 and 6 ECHR on the rights to liberty and due process, and she dismisses the question on the grounds of public policy concerns: it is indeed possible to deprive people of their liberty if that is needed in the context of what is accepted in a democratic society. The referring court had also asked about the primary character of the Charter and the ECHR after the entry into force of Lisbon, again readily dealt with by A.G. Sharpston as she pointed out the clear answer here: the Charter has the same legal value as the Treaties. More interestingly, she analyses the mutual recognition principle embodied in the EAW in the light of the *NS* judgment, mentioned above, where the Court had held that there can be no obligation to surrender if there is a real risk that human rights will not be respected and asylum seekers would face inhuman or degrading treatment. Thus, at [81]–[82] of her Opinion, A.G. Sharpston points out that,

> "it is plain that the whole objective of the decision would be undermined if it were possible to raise what I might describe as 'routine' challenges based on notional breaches of human rights. It is necessary to bear in mind that the interests of the victims of crimes in seeing their perpetrators brought to justice are also at stake."

Therefore she concluded that the test for refusal must be a rigorous one, though, at the same time, she recommends a more lenient test than that adopted by the ECtHR, in that the requested person must persuade the decision-maker that their objections to the transfer are substantially well founded. So is mutual recognition still a workable concept? A.G. Sharpston's Opinion appears to be if not in sharp contrast at least in some degree of disharmony with the outcome of *Da Silva Jorge* and its insistence on the effectiveness of EU law. The Court's judgment will serve as an important clarifying account in this regard, concerning the limits to the mutual recognition test in criminal law matters.

Boundaries of mutual recognition in the context of effectiveness

In its judgment in *Da Silva Jorge*, the Court pointed out that ground for optional non-execution has the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires. Yet the Court deduced from the *Wolzenburg* judgment that there is no unconditional right to equal treatment with regard to the optional grounds for non-surrendering. Thus the Court emphasised that the Member States cannot undermine the principle of non-discrimination by limiting the relevance of that option to their own nationals only, and having regard to non-nationals staying or residing in the territory.

The *Da Silva Jorge* judgment thus appears to have shifted focus from an overreliance on trust to classic effectiveness reasoning *combined with* an underlying ratio of trust instead of focusing on trust as the sole basis. This is new in the context of the EAW. Perhaps it confirms that the Court now feels the need to

[41] Opinion of A.G. Sharpston in *Criminal Proceedings against Radu* (C-396/11), October 18, 2012.

[42] See generally C. Gearty, *Civil Liberties* (Oxford: Clarendon Law Series, 2007); and A. Ashworth and M. Redmayne, *The Criminal Process*, 3rd edn (Oxford: Oxford University Press, 2005).

reinforce its mutual trust paradigm with a more practically oriented test of effectiveness.[43] More specifically, the Court pointed out that,

> "the fact remains that the principle that national law must be interpreted in conformity with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognized by it, with a view to ensuring that the framework decision in question is fully effective and to achieving an outcome consistent with the objective pursued by it."[44]

In backing up its argument the Court cited the recent decision in *Dominguez*.[45] Although the Court's statement on the basics of indirect effect in general is far from controversial in mainstream EU law, it is nonetheless of importance in that it discusses that doctrine in the light of the EAW. *Dominguez* belongs to a string of cases on the boundaries of the horizontal effect of directives.[46] While the current case law on indirect effect (and/or the possibilities of horizontal effect) and the impact of effectiveness appears blurred and highly debatable, as demonstrated by cases such *Mangold*[47] and *Kükükdeveci*,[48] it is still to take shape within the AFSJ. These cases have insisted on the full effectiveness of EU law not only when it comes to the scope of indirect effect, but have also given strong guidelines as regards the interrelationship between EU law and private law in the context of general principles of EU law.[49]

In any case, it is argued that the Court has partially departed from *Wolzenburg* not in terms of the result to be achieved but as regards the way it can be achieved. While *Wolzenburg* was still strongly focused on trust, and, as an associated goal, it mentioned the need for recognition of the non-discrimination and citizenship principles, the judgment in *Da Silva Jorge* seems to take objective for granted. In other words, while previous cases have focused on the notion of trust as the basis for the operation of the EAW, *Da Silva Jorge* recognises the need for equal treatment in the former Third Pillar as well as the importance of rehabilitation issues when deciding on the surrendering procedure. In addition, the *De Silva Jorge* ruling uses classic EU law criteria for "residing" or "staying" and having established a sufficient link with society in order fully to benefit from the option to remain in a host state prison. In its judgment in *Da Silva Jorge*, the Court also pointed out that in *Wolzenburg*, a five-year residence requirement was the given timeline for the establishment of a sufficient link: but interestingly, in contrast to *Wolzenburg*, the Court in *Da Silva Jorge* does not mention the Citizenship Directive at all.[50] Therefore it is not clear to what extent a national court's obligation to interpret the EAW in line with non-discrimination could trump the five-year residency requirement as was applied in *Wolzenburg*. In the light of the strong message of effectiveness in the more recent case, there is an unambiguous obligation to respect non-discrimination even if it concerns the operation of the EAW and the previous assumption of trust.

In addition, the *Melvin West* judgment appears also to be influenced by effectiveness thinking along the same lines as *Da Silva Jorge*, in making it clear that there is no need to guarantee the consent of all

[43] Thanks to the anonymous reviewer of this journal for pointing this out.

[44] *Da Silva Jorge* (C-42/11) [2012] 3 C.M.L.R. 54 at [56].

[45] *Dominguez* (C-282/10) [2012] 2 C.M.L.R. 14.

[46] See the contributions in forthcoming book by D. Leczykiewicz and S. Weatherill, *The Involvement of EU Law in Private Law Relationships* (forthcoming, Hart Publishing, 2013).

[47] *Mangold v Helm* (C-144/04) [2005] E.C.R. I-9981; [2006] 1 C.M.L.R. 43.

[48] *Kükükdeveci v Swedex GmbH & Co KG* (C-555/07) [2010] E.C.R. I-5769; [2010] 2 C.M.L.R. 33.

[49] While it is true that *Dominquez* sent ambiguous signals as regards the reach of horizontality in private law relationships, it still insisted on *Francovich* liability as an extra backup for ensuring the full effectiveness of EU law: *Francovich v Italy* (C-6 and C-9/90) [1991] E.C.R. I-5357; [1993] 2 C.M.L.R. 66.

[50] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77.

Member States in the EAW chain. There is thus a cost-benefit aspect here too—beyond that of effective judicial protection—recognised by the Court of Justice and linked to the concept of mutual trust.

Conclusion

The journey of the EAW from the intergovernmental days of the former Third Pillar to the introduction of the Lisbon Treaty has been an interesting one. It is argued that the case law has shifted from the establishment of mutual trust as the basis for the operation of the EAW and as a legitimate foundation on which to base this instrument towards a mainstreaming approach by insisting on a "synchronisation" of this legislative measure with the rest of the EU law *acquis*. The EAW was adopted in haste and as a response to the terrorist attacks of 9/11. The European Union had to set the ball rolling by applying mutual recognition as the template upon which to build EU criminal law co-operation. Most commentators would agree that it happened too early and that criminal suspects were the legal guinea pigs. Ten years later, not only is the legal setting different, with the extended jurisdiction of the Court of Justice and the possibilities to adopt legal safeguards as a result of the extended powers granted by Lisbon, but the mentality seems different too. The Court is now presented with a new judicial task: how not to mess up the effectiveness principle in this area as it has previously done in its case law on directives. Effectiveness has always played a part of paramount importance in the development of EU law and, as such, has formed part of the Court's most reliable arsenal since the early days of the EEC. In 2014, the Transitional Protocol expires and all former Third Pillar instruments will be treated as "Lisbonised". As highlighted by the cases discussed above, the EAW has already found its way into mainstream EU law doctrine and the principle of effectiveness plays a key role here. But the judicial toolbox in which effectiveness can be found, and towards which the EAW is being moved, now needs a clearly marked label for any further relocation: "handle with care" would be a good start.